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In the Supreme Court of the United States

OCTOBER TERM, 1991

REPUBLIC NATIONAL BANK OF MIAMI

Petitioner,

vs.

UNITED STATES OF AMERICA

Respondent,

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY BRIEF BY PETITIONER

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ARGUMENT

In its initial Brief on the Merits, Petitioner Republic National Bank of Miami ("Republic" or "the Bank") showed that the Eleventh Circuit erred by holding that the Government's transfer of the money from one Government account to another during the appeal divested the court of appellate jurisdiction. Republic analyzed the admiralty law origins of the Government's proposed rule of appellate jurisdiction and explained why the Government's attempted analogy to admiralty law fictions should not prevail here. Republic showed that the basic principles of *in rem* jurisdiction — which were developed to broaden jurisdiction and expand the remedies of aggrieved parties — should not be used to narrow or extinguish appellate remedies in civil forfeiture currency cases. Republic also exposed the injustice of the Government's position — which would require claimants to forfeited property to obtain an emergency stay or post a supersedeas bond in order to appeal, even though the *res* is located in a Government-controlled account and thus in no danger of being dissipated pending appeal.

In its Brief on the Merits, the Government argues that absent a stay or a bond, the Government can terminate the jurisdiction of the appellate courts in civil forfeiture cases by transferring the *res* during the appeal, and that it would take an act of Congress to revive jurisdiction. The Government also argues the adverse "facts" found by the district court, undoubtedly intending to shift this Court's focus from the legal issue involved in this proceeding.

As discussed below, the cases cited by the Government support Republic's position, not the Government's, and the Constitutional provisions on which the Government rely do not apply to the issue presented. The Government also fails to address the central policy consideration raised in this case: What protection does a supersedeas bond or stay afford the Government during an appeal of a civil forfeiture judgment involving money where the Government at all times has custody of the funds? The answer is none — there is no sound reason to require claimants to post a

bond or obtain a stay as a condition precedent to appeal. The sole reason for the Government's proposed rule is its desire to prevent claimants from appealing. We respond below to the Government's arguments and explain why this Court should reject them.

I. THE GENERAL RULE: *IN REM* ADMIRALTY JURISDICTION VESTS ON INITIAL SEIZURE OF THE *RES* AND IS NOT DIVESTED BY THE SUBSEQUENT RELEASE OF THE PROPERTY.

Both parties agree that *in rem* admiralty jurisdiction attaches when the *res* is initially seized within the jurisdiction of the district court. Government's Brief at 13; Republic's Brief on the Merits at 6. The Government argues, however, that in a civil forfeiture case, the district court must also continue to have control of the *res* throughout the appeal, and if the Government transfers the property during the appeal, the appellate court cannot hear the case. The Government argues, by analogy, to admiralty law that "it has long been settled" that the release of the ship after initial seizure divests a court of admiralty jurisdiction, Government's Brief at 14, and cites *The Brig Ann*, 13 U.S. (9 Cranch) 289 (1815); *United States v. The Little Charles*, 26 F. Cas. 979 (C.C.D. Va. 1818); and *The Rio Grande*, 90 U.S. (23 Wall.) 458 (1874), in support of that assertion. The Government misreads these decisions.[1]

In *The Rio Grande*, this Court set forth the general rule that *in rem* admiralty jurisdiction is complete on initial seizure of the *res*:

> *We do not understand the law to be that an actual and continuous possession of the res is required to sustain the jurisdiction of the court. When the vessel was seized by the order of the court and brought within its control the jurisdiction was complete. . . .*

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[1] The other cases cited on page 13 of the Government's Brief reiterate the general proposition that *in rem* jurisdiction depends on the court's seizure of the property, and do not address the consequences, if any, of the subsequent loss of possession of the property on the court's jurisdiction.

> We hold the rule to be that a valid seizure and actual control of the res by the marshal gives jurisdiction of the subject-matter, and that an accidental or fraudulent or improper removal of it from his custody, or delivery to the party upon security, does not destroy jurisdiction.

90 U.S. (23 Wall.) at 463-65 (emphasis added).

The Little Charles states essentially the same general rule that *in rem* admiralty jurisdiction is complete on initial seizure and is not divested by subsequent removal. There, Chief Justice Marshall, sitting as a Circuit Judge, rejected the contention "that the court has lost its jurisdiction, by losing possession of the thing to be condemned." 26 F. Cas. at 982. Rather, as Justice Marshall explained:

> That possession of the thing is necessary, as a foundation for the jurisdiction of the court, is, in general, true. There must be seizure to vest the jurisdiction. *But it is not believed that the continuance of possession, is necessary to continue the jurisdiction.* It is a general principle, that jurisdiction, once vested, is not divested, although a state of things should arrive in which original jurisdiction could not be exercised.

Id. (emphasis added).

In *The Little Charles,* Justice Marshall set forth, hypothetically, an exception to the general rule, namely, where the release of the property would render the judgment "useless" because "the thing could neither be delivered to the libellants, nor restored to the claimants," *id.,* there might be a loss of jurisdiction. Justice Marshall noted, however, that this exception "will not apply to any case where the judgment will have any effect whatever." *Id.*[2]

The only time this Court has recognized any exception to the general rule that continued control of the *res* is not required for *in*

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[2] The admiralty and prize statutes cited in the Government's Brief at 19 *et seq.* codify the general rule that *in rem* jurisdiction is vested on initial seizure. These statutes do not purport to divest an appellate court of jurisdiction where the Government removes the property.

rem admiralty jurisdiction was in *The Brig Ann,* 13 U.S. (9 Cranch) 289 (1815). There, the Court held that where the Government as the seizing party voluntarily abandoned the property to the defendant, the court could not proceed until a new seizure occurred. 13 U.S. at 291. Thus, for this exception to apply, the seizing party must voluntarily abandon the property.

The general rule of *in rem* jurisdiction discussed above is consistent with the purpose of *in rem* admiralty jurisdiction, which is to broaden the availability of remedies. Both the "voluntary abandonment" and "useless judgment" exceptions suggested in *The Brig Ann* and *The Little Charles* are based on the same practical necessity — that the court would have no power to enforce its decree. *The Brig Ann, supra,* 13 U.S. at 331; *The Little Charles, supra,* 26 F. Cas. at 982. Where the court may enforce its decree, neither exception applies.[3]

II. THE GOVERNMENT CAN BE ORDERED TO RESTORE THE PROPERTY AFTER A SUCCESSFUL APPEAL.

The general rule of continued jurisdiction after initial seizure and the two limited exceptions to the rule expose the fallacy of the Government's argument. The jurisdictional inquiry presented does not end by merely labelling the action "*in rem.*" Rather, the issue before this Court is whether the Government's transfer of the *res* to another Government bank account will render a subsequent judgment useless, or stated differently, whether the Government may be required to restore the property to the claimant if the judgment is reversed.

Here, although the Government transferred the funds after judgment was entered, a decision by the Eleventh Circuit on the merits will neither be ineffective nor useless. If the Eleventh Circuit affirms, the Government has an effective remedy, as it

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[3] Additionally, the "voluntary abandonment" exception recognized by this Court in *The Brig Ann* requires the seizing party — here the Government — to abandon the property. The Government has never abandoned the property in this case.

already has the funds. If the Eleventh Circuit reverses, Republic has an effective remedy, as the Government can be ordered to return the money to the Bank in payment of its mortgage under the ordinary rules of restitution applicable to all cases, *e.g., Atlantic Crash Line R. Co. v. State of Florida,* 295 U.S. 301, 309, (1935); *Bank of United States v. Bank of Washington,* 31 U.S. (6 Pet.) 8, 19 (1832), and under 28 U.S.C. §§ 2465 and 524 (c)(1)(D). *See infra at 10-12.*

A. THE COURT HAS JURISDICTION TO ORDER RETURN OF THE MONEY.

The Government argues that in an *in rem* action, after the Government takes the property, the court lacks jurisdiction to order the Government to return the property because the court supposedly lacks *in personam* jurisdiction over the Government. Government's brief at 35-36. The only forfeiture case cited by the Government is *United States v. One Lear Jet Aircraft,* 836 F.2d 1571 (11th Cir.) (*en banc*), *cert. denied,* 487 U.S. 1204 (1988). As discussed in Republic's Brief on the Merits at 11-12, the Second, Fourth and Eighth Circuits have rejected the conclusion of *One Lear Jet. See United States v. Aiello,* 912 F. 2d 4, 7 (2d Cir. 1990), *cert. denied,* __U.S.__, 111 S. Ct. 757 (1991); *United States v. $95,945.18,* 913 F. 2d 1106, 1109 (4th Cir. 1990); *United States v. $12,390.00,* 956 F. 2d 801, 804 (8th Cir. 1992).

One Lear Jet is wrong in concluding that the appellate court lacks *in personam* jurisdiction over the Government in a forfeiture action brought by the Government. The majority in *One Lear Jet* incorrectly focused solely on the nature of the action *as against* the defendant property. We agree that as against the defendant property, or as against the claimant who makes a limited appearance, *see* Rule E(8), Supplemental Rules for Certain Admiralty and Maritime Claims, the court has *in rem* jurisdiction. That conclusion is irrelevant to the court's jurisdiction over the Government. There is a critical distinction between *in rem* jurisdiction over a defendant and jurisdiction over a plaintiff who initiates the action. In an *in rem* proceeding, the defendant can, if it wishes, limit its risk to losing its interest in the

seized property. Defendants are entitled to this protection because an *in rem* proceeding offers a plaintiff the opportunity to assert a claim against property where the owner/defendant may not be subject to the court's *in personam* jurisdiction. *See* Republic's Brief on the Merits at 10-14.

A plaintiff, however, is in a fundamentally different position. As in any *in personam* case, a plaintiff who commences an *in rem* action seeks to use the power of the court to obtain affirmative relief. The court's jurisdiction over a plaintiff is, accordingly, identical in either an *in personam* or an *in rem case*. As Judge Edmondson reasoned, in his dissent in *United States v. One Lear Jet Aircraft*, 836 F.2d 1571, 1584 (11th Cir.) (*en banc*), *cert. denied*, 487 U.S. 1204 (1988):

> The idea that, when a plaintiff comes into a court system requesting the courts' assistance in resolving a case, the plaintiff submits its person to the jurisdiction of those courts until the case is finally concluded seems to me to be neither innovative nor unfair. I agree with Judge Vance when he says that "we have had in personam jurisdiction over the United States from the instant the government invoked the jurisdiction of the federal courts to initiate the forfeiture proceeding."

This Court has recognized the distinction between jurisdiction over defendants and jurisdiction over plaintiffs in cases regarding counterclaims in admiralty/*in rem* libels. In *British Transport Comm'n v. United States*, 354 U.S. 129 (1957), this Court ruled that all claims against all parties who affirmatively seek damages which arise out of a collision between two vessels could be heard in an *in rem* libel. This Court stressed the obligation that comes from seeking affirmative relief in an *in rem* case:

> [F]airness in litigation requires that those who seek affirmative recovery in a court should be subject therein to like exposure for the damage resulting from their acts connected with the identical incident.

354 U.S. at 142.

This admiralty rule applies to the United States as a claimant seeking affirmative relief. *United States v. The Thekla,* 266 U.S. 328, 340-41 (1924) ("[The Government] joined in the suit, and that carried with it the acceptance of whatever liability the courts may decide to be reasonably incident to the act.") (brackets added). This Court has applied the same rule to the seizure of a ship as a prize. *See United States v. The Paquete Habana,* 189 U.S. 453, 465 (1903); *United States v. The Nuestra Senora de Regla,* 108 U.S. 92, 102 (1883). *See generally United States v. National City Bank of New York,* 83 F.2d 236, 238 (2d Cir.), *cert. denied,* 299 U.S. 563 (1936).

The forfeiture decisions of the Second, Fourth and Eighth Circuits and the dissenting opinions in *One Lear Jet* are consistent with this Court's decisions regarding counterclaims against the Government in admiralty/*in rem* cases. Here, the United States initiated this action, and by doing so, submitted itself to the court's jurisdiction until the case is finally adjudicated.

B. NEITHER THE APPROPRIATIONS CLAUSE NOR THE DOCTRINE OF SOVEREIGN IMMUNITY PRECLUDES THE RETURN OF THE PROPERTY.

The Government expresses "concerns" that under the Appropriations Clause, Article I, § 9, Cl. 7 to the U.S. Constitution, the courts may be powerless to prevent the Government from eliminating appellate jurisdiction in civil forfeiture cases. Government's Brief at 30. The Government also claims that the doctrine of sovereign immunity prevents the appellate court from hearing an appeal of an action brought by the Government. Government's Brief at 35-36. The Government is wrong.

1. Appropriations Clause.

The Appropriations Clause provides that "no money shall be drawn from the Treasury, but in consequence of appropriations made by law." This provision requires that before money is paid from the Treasury, it "must be authorized by a statute." *Office of Personnel Management v. Richmond,* 496 U.S. 414, 423 (1990). The rationale for the clause is:

> to secure regularity, punctuality, and fidelity, in disbursements of public money .... If it were otherwise, the executive would possess an unbounded power over the public purse of the nation; and might apply all its money resources at his pleasure. The power to control and direct the appropriations, constitutes a most useful and salutary check upon profusion and extravagance, as well as upon corrupt influence and public peculation....

2 J. Story, *Commentaries on the Constitution of the United States* § 1348 (3d ed. 1858) (quoted in *Office of Professional Management, supra,* 496 U.S. at 427).

As an initial matter, the Government's reliance on the Appropriations Clause turns the separation of powers doctrine on its head. The Government attempts to use that doctrine — which limits each branch from encroaching on the other — to justify its attempt to encroach on the power of the judiciary to hear appeals. None of the cases cited by the Government justifies its misuse of the Appropriations Clause.

The Appropriations Clause cases cited by the Government limit the Executive Branch from using its Article II power to raid the Treasury. For instance, in *Knote v. United States,* 95 U.S. 149 (1877), this Court held that the Presidential pardon power, Article II, § 2, could not be used to require repayment of funds in the Treasury previously forfeited by the pardoned offender, absent congressional authorization. Similarly, in *Office of Personnel Management v. Richmond,* 496 U.S. 414, 428 (1990), this Court refused to allow unauthorized acts of agents of the Executive Branch to obligate the Treasury for the payment of funds. *See Reeside v. Walker,* 52 U.S. (11 How.) 272, 291 (1850) ("However much money may be in the Treasury at any one time, not a dollar of it can be used in the payment of any thing not thus previously sanctioned. Any other course would *give to the fiscal officers a most dangerous discretion.*") (emphasis added).

This case is different. Here, the Executive Branch brought a lawsuit which it won in the trial court, transferred the forfeited

funds during the appeal and now argues that only an Act of Congress can give Republic relief. This Court has recognized that the separation of powers doctrine limits each branch; it is not a tool of aggrandizing one branch of the Government to the detriment of another:

> Although *Knote v. United States*, 95 U.S. 149, 154, 24 L.Ed. 442 (1877), held that the President's pardon power did not extend to the appropriation of moneys in the treasury without authorization by law for the benefit of pardoned criminals, it did not hold that Congress could impair the President's pardon power by denying him appropriations for pen and paper.

Office of Professional Management, 496 U.S. at 435 (White, J. and Blackmun, J., concurring).

As discussed in Republic's Brief on the Merits at 10, in *Nations v. Johnson*, 65 U.S. (24 How.) 195 (1860), this Court held that a party may not, by its unilateral act, "deprive the other party of all means of removing the cause to the appellate tribunal . . . by defeating the jurisdiction of the appellate court." 65 U.S. at 204. *See Leman v. Krentler-Arnold Hinge Last Co.*, 284 U.S. 448, 454 (1932) ("[A]fter a final decree a party cannot defeat the jurisdiction of the appellate tribunal by removing from the jurisdiction, as the proceedings on appeal are part of the cause.")[4] The Government's Appropriations Clause argument is merely a pretext to encroach on the judiciary, which should be rejected.[5]

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[4] The Government does not address either of these cases.

[5] The Government's argument that the subject funds transferred by it to the Assets Forfeiture Fund are now "public funds" and thus not subject to return unless Congress authorizes it begs the ultimate question before this Court: If Republic is correct that the general rule of *in rem* jurisdiction applies — that initial seizure of the *res* is sufficient to confer jurisdiction throughout the case — then Republic has the right to an appeal, and the funds are not yet "public funds," as Republic's right to those funds has not been conclusively determined. Thus, merely to label the funds as "public funds" and then to argue that because they supposedly are, the appellate court cannot hear the case does not resolve the issue here. Likewise, if Republic is correct, the location of the property after initial seizure is irrelevant, and *Knote v. United States*, 95 U.S. 149 (1877), is

The Government's Appropriations Clause argument has been rejected by the appellate courts. *See United States v. $95,945.18*, 913 F.2d 1106, 1110 n.4 (4th Cir. 1990) ("reversal of a judgment of forfeiture" is viewed as "analogous to a suit for the refund of erroneously paid taxes or to recover for a wrongful levy"); *United States v. Aiello*, 912 F.2d 4, 7 (2d Cir. 1990), *cert. denied*, __U.S.__, 111 S.Ct. 757 (1991) ("We do not believe that funds collected by the United States pursuant to a judgment of the District Court are insulated by the Appropriations Clause from return to the rightful owner in the event of a reversal of that judgment simply because the funds are held in the Treasury during the course of the litigation"). Even the Ninth Circuit — which initially accepted the argument — has, after further reflection, rejected it. In *United States v. Ten Thousand Dollars*, 860 F.2d 1511 (9th Cir. 1988), the court distinguished *United States v. $57,480.05*, 722 F.2d 1457 (9th Cir.), *cert. denied*, 469 v.s. 916 (1984) (cited at page 34 of the Government's Brief), and held that if the claimant prevails on appeal, "the money at stake may be restored by judicial action and need not wait for a congressional appropriation." 860 F.2d at 1514.

If a Congressional appropriation were necessary to restore the property, we submit that Congress has so acted and that there is express statutory authorization for the Government to repay the funds to Republic from the Treasury. Title 28 U.S.C. § 2465 provides:

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inapposite because in that case the forfeiture proceeding was concluded prior to the Executive's pardon.

Moreover, the Government does not seriously address the fact that when it purported to transfer the "funds" to the Assets Forfeiture Fund, it was not transferring a specific identifiable *res* but rather was creating a bookkeeping entry between two Government accounts. As discussed in Republic's Brief on the Merits at 15-16, the First and Third Circuits have concluded that the supposed transfer of forfeited funds from the jurisdiction "is nothing more than a shell game" and jurisdiction should not depend on which Government pocket holds the funds. *United States v. One Lot of $25,721 in Currency*, 938 F.2d 1417, 1420 (1st Cir. 1991). *See United States v. $1,322,242.58*, 938 F.2d 433, 437-38 (3d Cir. 1991).

> *Return of property to claimant; certificate of reasonable cause; liability for wrongful seizure:* Upon the entry of judgment for the claimant in any proceeding to condemn or forfeit property seized under any Act of Congress, such property shall be returned forthwith to the claimant or his agent; but if it appears that there was reasonable cause for the seizure, the court shall cause a proper certificate thereof to be entered and the claimant shall not, in such case, be entitled to costs, nor shall the person who made the seizure, nor the prosecutor, be liable to suit or judgment on account of such suit or prosecution.

Congress has authorized and directed the return of seized property in civil forfeiture proceedings to a claimant upon entry of judgment in its favor. The statute does not say it is limited to judgments of the district courts; if the appellate court entered judgment for the claimant on appeal, that court (or the district court on remand) could also direct return of the property under 28 U.S.C. § 2465. *Cf. Hatzlachh Supply Co., Inc. v. United States,* 444 U.S. 460, at 467 (1980) (Blackmun, J., dissenting) (28 U.S.C. § 2465 imposes duty on the United States to return property if forfeiture is not upheld).

The Government argues that it does not have the power or right to return money it transferred to the Assets Forfeiture Fund to satisfy a court order directing it to return the money. The Government, however, ignores the very statute it cites, which grants it express permission and power to use money from the Fund to pay liens and mortgages on forfeited property without separate Congressional appropriation. Title 28 U.S.C. § 524(c) established a "special fund to be known as the Department of Justice Assets Forfeiture Fund . . . which shall be available to the Attorney General without fiscal year limitation." Subsection (c)(1)(D) provides for the following payment by the Government:

> (D) [T]he compromise and payment of valid liens and mortgages against property that has been forfeited pursuant to any law enforced or administered by the Department of Justice, subject to the discretion of the Attorney

> General to determine the validity of any such lien or mortgage in the amount of payment to be made . . . .

In turn, by internal regulations, the Attorney General (or the designate) is authorized to make "payments and reimbursements" for several categories, including the following:

> "Payment of qualified third party interests." Qualified third party interests are those expenses incurred in the payment of valid liens, secured mortgages and debts owed to qualified general creditors *pursuant to court order* or a favorable ruling on a petition for remission or mitigation of the forfeiture. This includes the restoration of the proceeds of sale pursuant to a court order or an administrative determination. Nothing in this section shall preclude a departmental component from seeking reimbursement from the state or local agency that received the property that is the basis of the claim.

Attorney General's Guidelines on Seized and Forfeited Property, Section VII.B.3., *reprinted in,* 1 D. Smith, Prosecution and Defense of Forfeiture Cases, at App. 7B (1985) (emphasis added). Under this statute, the Government is empowered and authorized to remit the funds pursuant to court order without violating the Appropriations Clause.[6]

2. Sovereign Immunity.

> It is well established that:
>
> In the absence of clear Congressional consent, then, "there is no jurisdiction in the Court of Claims more than in any other court to entertain suits against the United States."

United States v. Mitchell, 445 U.S. 535, 538 (1980) (quoting *United States v. Sherwood,* 312 U.S. 584, 587-88 (1941)).

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[6] The Government asserts that it is "clear" that §524(c) "does not authorize" payment of the Bank's mortgage from the forfeited funds. Government's Brief at 34. A fair reading of subsection (c)(1)(D) above contradicts the Government's argument. Unlike §524(c)(1)(E), which relates to administrative petitions for remission and mitigation, §524(c)(1)(D) relates to "court orders," as even the Attorney General's own regulations, quoted above, explain.

Although the sovereign immunity doctrine protects the Government from many types of lawsuits instituted against the Government, it does not protect the Government from claims made by defendants (such as the Bank in this case) up to the amount of the Government's claim. This Court has consistently held that a defendant sued by the Government may, regardless of sovereign immunity, assert a set-off against the Government up to the full amount of the Government's claim. In *United States v. Ringgold*, 33 U.S. (8 Pet.) 150, 163 (1834), this Court explained:

> No direct suit can be maintained against the United States. But when an action is brought by the United States, to recover money in the hands of a party, who has a legal claim against them, it would be a very rigid principle, to deny him the right of setting up such claim in a court of justice, and turn him round to an application to congress. If the right of the party is fixed by the existing law, there can be no necessity for an application to congress, except for the purpose of remedy. And no such necessity can exist, when this right can properly be set up by way of defense, to a suit by the United States.

Similarly, in *The Siren*, 74 U.S. (7 Wall.) 152, 154 (1868), this Court reasoned:

> But although direct suits cannot be maintained against the United States, or against their property, yet, when the United States institute a suit, they waive their exemption so far as to allow a presentation by the defendant of set-offs, legal and equitable, to the extent of the demand made or property claimed, and when they proceed *in rem*, they open to consideration all claims and equities in regard to the property libelled.

As discussed above, *supra* at 7, the rule is even more liberal in admiralty actions. In *United States v. The Thekla*, 266 U.S. 328 (1924), the United States filed a claim in an admiralty case arising from a collision between two ships, one of which was being operated by the United States during war time. The trial court

found that the ship operated by the Government was at fault, and entered judgment against the United States.

This Court affirmed, holding that the district court was empowered by law to render a judgment against the Government, despite the Government's sovereign immunity argument. In explaining its ruling, Justice Holmes stated:

> When the United States comes into Court to assert a claim it so far takes the position of a private suitor as to agree by implication that justice may be done with regard to the subject matter. The absence of legal liability in a case where but for its sovereignty it would be liable does not destroy the justice of the claim against it ....
>
> It is said that there is no statute by which the Government accepted this liability. It joined in the suit, and that carried with it the acceptance of whatever liability the courts may decide to be a reasonable incident to the act.

266 U.S. at 339-41. *See American Propeller & Mfg. Co. v. United States,* 300 U.S. 475, 478 (1937); *cf. Guaranty Trust Co. v. United States*, 304 U.S. 126, 134 (1938) (in dicta, this Court said: "Even the domestic sovereign by joining in suit accepts whatever liabilities the court may decide to be reasonable incident of that act.").[7]

In this case, the Government sued to forfeit real property which was later converted to money when the real property was sold. The Bank, as mortgagee, filed a claim as authorized by Congress. 21 U.S.C. § 881. The Bank did not seek a money judgment against the Government but a determination that its mortgage is valid and superior to the Government's title claim under the forfeiture laws. Republic's claim was in the nature of an offset to the Government's claim, up to the amount owing on its

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[7] We do not suggest that the Government is exposed to claims against it in excess of the amount of its claim outside of the admiralty context. *See United States v. Shaw*, 309 U.S. 495 (1940).

mortgage.[8] Republic's claim that its mortgage is valid and that its interest is superior to the Government's does not violate the doctrine of sovereign immunity.

The Government's sovereign immunity argument has been rejected even in the Ninth Circuit, which otherwise has accepted the Government's *in rem* arguments. In *United States v. Ten Thousand Dollars*, 860 F.2d 1511 (9th Cir. 1988), the court rejected the sovereign immunity argument for a claim under $10,000, citing to the Little Tucker Act, 28 U.S.C. § 1346(a)(2):

> If a claim falls within the Act, the United States "has presumptively consented to suit." *United States v. Mitchell*, 463 U.S. 206, 216, 103 S.Ct. 2961, 2967, 77 L.Ed.2d 580 (1983). An action to recover an allegedly unlawful forfeiture under a revenue act is a claim founded upon a law of Congress. *Menkarell v. Bureau of Narcotics*, 463 F.2d 88, 90 (3rd Cir. 1972). The reasoning of *Menkarell* has been extended in this circuit to hold that a claim asserting that any forfeiture is unlawful is a claim seeking relief under the Tucker Act. *Simons v. United States*, 497 F.2d 1046, 1049 (9th Cir. 1974).[9]

860 F.2d at 1514; *see also In re Newport Sav. and Loan Ass'n*, 928 F.2d 472 at 478 (1st Cir. 1991) (court stated in *dicta* that in forfeiture actions, Government may not assert sovereign immunity).

The Government also argues that only Congress can make "exceptions" to the Government's reading of the *in rem* rule. The general rule is that *in rem* jurisdiction is complete on initial seizure and is not divested by subsequent removal of the property. Congress has never changed the rule, and has not passed any

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[8] Congress has waived sovereign immunity for actions involving title disputes on real property in which the United States claims an interest, 28 U.S.C. § 2409a, and for actions to foreclose a mortgage on real or personal property on which the United States claims a lien. 28 U.S.C. § 2410.

[9] *See* The Tucker Act, 28 U.S.C. § 1491(a)(1), which has the identical provision as to claims against the Government in excess of $10,000.

statute which provides that the Government's transfer of the *res* destroys appellate jurisdiction in civil forfeiture cases.[10]

Although Congress has enacted some statutes dealing with *in rem* jurisdiction, most *in rem* jurisdictional rules are judge-made and have been developed in case law over two hundred years. Congress has passed laws which state that initial seizure of the *res* is necessary, and laws which, for the Government's convenience, authorize the Government to move seized property outside the judicial district during the pendency of *in rem* proceedings.[11] And as discussed below, Congress has also expanded jurisdiction in civil forfeiture actions through 21 U.S.C. § 881(j).

III. 21 U.S.C. § 881(j) EXPANDS *IN REM* JURISDICTION IN CIVIL FORFEITURE CASES.

In its Brief on the Merits, Republic showed that 21 U.S.C. § 881(j) provides an additional basis on which the court retains jurisdiction in civil forfeiture actions regardless of the location of the property. In its Brief, the Government argues that § 881(j) "bears only on venue; it does not concern the Court's jurisdiction." Government's Brief at 40. The Government took the opposite position in at least one other court:

> The Government's position is that subsection 881(j) must represent a decision by Congress to extend *in rem* jurisdiction beyond the district in which the property is found

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[10] The proposed legislation, S.543, cited at the Government's Brief at 25, which would, if passed, preserve appellate jurisdiction in forfeiture actions even if the Government takes the property during the appeal, is consistent with and codifies the general rule in admiralty, discussed above, that *in rem* jurisdiction is complete on initial seizure. The proposed legislation adopts the view of the majority of circuit courts which have rejected the Government's position and rejects the contrary decisions of the minority circuits.

[11] The food and drug, customs and forfeiture statutes cited by the Government at 23-25 of its brief support Republic's position. Those statutes reaffirm that leaving property in the hands of the Government during the pendency of a case is appropriate because the court continues to have jurisdiction over the Government, and can order the Government to turn over the property at any time.

> because "[t]o create statutory venue powers without the attending jurisdictional basis would make § 881(j) a useless provision." Memorandum p.26. Thus, it is argued that, under 28 U.S.C. §§ 1395 and 881(j), this Court may properly assert *in rem* jurisdiction over property located outside of the Western District of New York.

United States v. U.S. Funds in the Amount of $3,035,648.50, No. Civ-91-217E, 1991 WL 236843 (W.D.N.Y. Nov. 4, 1991).

We submit that the Government's analysis and stated position in *U.S. Funds* is correct, and its conveniently-switched argument to this Court is wrong. As the Government affirmatively argued to the New York district court, if § 881(j) only bears on venue, then it is a meaningless statute, for venue cannot be broader than jurisdiction. If, as the Government contends here, the court may only assert *in rem* jurisdiction in a civil forfeiture case if the property is seized and controlled by the district court, then § 881(j), construed as a venue-only statute, would only empower the court to hear a civil forfeiture action where the property was located. Accordingly, although the statute purports to confer venue where the property owner is found or where the owner is indicted, the court would have no jurisdiction to hear the case in those locations unless the seized property was also there. Section 881(j), as so construed, would have no meaning, for the only proper venue would be the location of the property. *See United States v. Menasche*, 348 U.S. 528, 538-39 (1955) (statutes should not be construed to render them meaningless). The only logical interpretation of § 881(j) is, as the Government itself has argued elsewhere, that the statute, despite its title, expands *in rem* jurisdiction for civil forfeiture cases.

The Government also argues that § 881(j) is inapplicable here because when the Government bought suit, the owner of the property had not yet been indicted. According to the Government, the indictment, which occurred before the trial in this case was complete, came too late to be of jurisdictional significance. The Government again misconstrues § 881(j). The cornerstone of the Government's position is that the court must make continued

jurisdictional inquiries at every stage of the proceeding. *See, e.g.*, Government's Brief at 28. It follows that such inquiry would include the pertinent jurisdictional facts that exist at the time of the inquiry. Here, when the Government transferred the funds, another jurisdictional basis under § 881(j) existed: the owner had been indicted in the Southern District of Florida.

IV. THE GOVERNMENT'S REMOVAL OF THE PROPERTY DOES NOT MOOT THE APPEAL.

The Government expresses "serious concerns" that its removal of the funds has mooted the appeal. Government's Brief at 27. The Government's "concerns" are shared by only one of the circuits which sides with the Government, and there only tentatively. *See United States v. Certain Real and Personal Property*, 943 F.2d 1292, 1296 (11th Cir. 1991) ("[T]his case probably could be viewed in terms of mootness.").

The Government's "case or controversy" argument is circular. The Government concedes that where the court can "re-arrest" the *res* or obtain *in personam* jurisdiction over the plaintiff, its "serious concerns" disappear. Government's Brief at 30 n.13. As discussed above *supra* at 4-7, this is precisely what will occur if the Eleventh Circuit reverses the judgment on the merits.

V. THE ABILITY OF CLAIMANTS TO APPEAL FORFEITURE JUDGMENTS SHOULD NOT DEPEND ON THEIR FINANCIAL RESOURCES OR DISCRETIONARY DECISIONS OF THE DISTRICT COURTS OR COURTS OF APPEALS.

According to the Government, in a civil forfeiture action, unlike other actions in which a judgment has been entered, a claimant may appeal only if it posts a supersedeas bond or obtains a stay. The claimant must accomplish this within 10 days of entry of judgment.

The Government does not even attempt to explain why a claimant should be required to post a bond where the Government has the property in its custody. The purpose of a supersedeas bond is to assure the party who won in the trial court that the judgment will be paid if execution is delayed. There is no rational

basis to require a losing party to post a bond as a condition precedent to appeal where there is no risk that the fruits of victory cannot be enjoyed after the appeal. The only purpose to such a requirement is to place substantial unnecessary obstacles to discourage appeals. This Court has previously refused to permit the remedial purpose of *in rem* jurisdiction to be used as a "weapon to defeat that very purpose." *Continental Grain Co. v. The FBL-585*, 364 U.S. 19, 23 (1960).

The Government's argument also makes the claimant's ability to appeal depend on discretionary decisions of the district courts or courts of appeals if the claimant does not wish, or is not able, to post a bond in the full amount of the value of property already in the hands of the Government. According to the Government's proposed rule, after judgment is entered the claimant must file a motion for a stay with the district court. Pursuant to Fed.R.Civ.P. 62(d), the district court has the discretion to grant or deny the stay. If the district court denies the motion, or does not rule by the tenth day after entry of judgment, the Government may immediately remove the property, thereby mooting any further decision by the district court (which has, under the Government's theory, thereby lost jurisdiction) and depriving the claimant of the right to appeal.

Nor does the Government's charitable suggestion that the courts of appeals can grant emergency stays help claimants wishing to appeal. A motion for stay must ordinarily be filed in the first instance in the district court. Fed.R.App.P.8(a). And if the district court denies the motion for stay, the appellate court (assuming it can act to preserve its jurisdiction before the Government defeats it by removing the property) also has discretion to grant or deny the motion for stay without a full supersedeas bond. Fed.R.App.P. 8(b). Under the Government's theory, then, a claimant is not entitled to appeal a civil forfeiture judgment if it cannot, or chooses not to, post a bond; it is only entitled to ask the district courts and appellate courts to make discretionary rulings which, if too late or adverse, preclude appellate review.

Congress has provided that the courts of appeals have jurisdiction over district court judgments forfeiting property. *See* 28 U.S.C. § 1291(a). Congress has not seen fit to eliminate appellate jurisdiction if the Government removes the property before or during the appeal. Accordingly, as discussed at Republic's Brief on the Merits at 6, the procedure to appeal a civil forfeiture judgment is prescribed by the Federal Rules of Appellate Procedure, which authorize an appeal in every case without posting a bond or obtaining a stay.

This Court has noted that the Government as litigant is held to a higher standard: Its task is not merely to win no matter what it takes, but rather to assure that justice is done. *See Berger v. United States*, 295 U.S. 78, 88-89 (1935). There is no compelling justification for the Government's proposed rule, and no justice in the result it seeks.

CONCLUSION

This Court should vacate judgment below, and order the appellate court to reinstate Republic's appeal.

Respectfully submitted,

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